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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 46

SOUTHERN CONSTRUCTION COMPANY, INC., and CONTINENTAL CASUALTY COMPANY, *Petitioners*

v.

UNITED STATES to the use of SAMUEL J. PICKARD, d/b/a PICKARD ENGINEERING COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1961

No. 574

SOUTHERN CONSTRUCTION COMPANY, INC., and CONTINENTAL CASUALTY COMPANY, *Petitioners*

v.

UNITED STATES to the use of SAMUEL J. PICKARD, d/b/a PICKARD ENGINEERING COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF FACTS

This is essentially a contract proceeding involving a government contract for rehabilitation of certain barracks at Fort Benning, Georgia and Fort Campbell, Tennessee. Respondent subcontracted to do the mechanical work at both places for petitioner Southern Construction Company, which was the prime contractor with the government.

On the theory it had not been fully compensated plaintiff instituted proceedings under the Miller Act (Aug. 24, 1935, Ch. 642, 49 Stat. 793, Title 40, secs. 270(a)-270(d). against the prime contractor, and its surety, first on December 26, 1956, in the United States District Court for the Middle District of Georgia, and later on April 4, 1957, in the United States District Court for the Middle District of Tennessee. (App. Pgs. 7a and 40a)* The statute required the proceedings to be separate, as it provides suit must be instituted in the District where the work was performed, and "nowhere else."

The case in Georgia was tried first in March, 1959, before a Jury, and resulted in a general verdict for the plaintiff-respondent. Judgment was entered on March 18, 1959, and a motion for a judgment notwithstanding the verdict, or, in the alternative, for a new trial was filed by defendants. On March 31st of the following year the Georgia Court granted the motion N.O.V., and entered judgment for the defendants. As to the motion for a new trial, the Court at the same time said: "The Court makes no ruling at this time on the defendants' motion for a new trial on the main case nor on the defendants' motion for a new trial on the counterclaim. (App. Pg. 57a) The Georgia Court has recently granted petitioners motion for a new trial on its counterclaim.

The case in Tennessee was tried in Nashville, in October, 1959, and was tried before a jury, to which special questions were submitted, with the exception that the issue pertaining to the counterclaim, which is the subject of the petition herein, was tried exclusively before the Court, by agreement of counsel. The answers of the Jury were favorable to plaintiff-respondent (App. Pg. 12a). However, by allowing the use of a counterclaim which is the

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* References are to Appendix filed below by Respondent, such Appendix being now a part of the Record in this Court.

subject of the petition herein, the trial Court for all practical purposes nullified the verdict of the Jury.

Respondent appealed to the Circuit Court of Appeals for the Sixth Circuit which ruled that the counterclaim could not be recognized in this Tennessee proceeding, saying it was a compulsory counterclaim in the earlier Georgia proceeding. From this ruling petitioner seeks a writ of certiorari from this Court.

The facts concerning the counterclaim are these—first, so far as the pleadings in both cases are concerned: So far as the pleadings in the Georgia case are concerned, it can be said the item of $35,000 in question was included to the end.

Petitioners say they did not ultimately "claim" the item of $35,000 in Georgia case, solely because their attorney advised them not to do so, and their attorney testified to the same effect. (App. Pg. 29a)

The record shows that the suit was filed in Georgia on December 26, 1956, and in Tennessee on April 4, 1957. It was not until the pre-trial hearing shortly before trial, on June 17, 1959, that there emerged any clear-cut intention on the part of defendant-petitioner to segregate the $35,000 for the purpose of asserting it in the Tennessee case. As a result of the pre-trial hearing, the defendant then, just three months before the trial, amended its counterclaim with a computation based largely on the item of $35,000. (App. Pg. 11a)

The proof on this issue shows that there were three separate contracts between plaintiff and defendant at Fort Benning totaling $513,075.11. There was one contract at Fort Campbell, at a contract price of $50,000. The largest single supplier for plaintiff on both projects was Atlas Supply Company of Atlanta, Georgia. When plaintiff's work was terminated on both jobs, about January 1, 1957, Atlas was owed on both jobs a total amount of

$139,492.06, the figures being $104,971.12 for deliveries to the Benning job, and $34,520.94 to the Campbell job involved here. To discharge its own liability, but not the liability of plaintiff-respondent the defendant-petitioner on August 28, 1957, eight months after the work was terminated settled the entire account by a payment to Atlas of $35,000. (App. Pg. 39a)

It has been stipulated in this case that the creditor, Atlas Supply Company, carried this account on its books as one single, indivisible account at the time the $35,000 settlement payment involved here was made.

The evidence shows that the sum of $35,000 was paid in settlement of the total amount. It is so stated in the release that was delivered in return for the check, both of which comprise plaintiff's Exhibit No. 22. (App. Pg. 39a) Defendant-petitioner's principal witness stated in his testimony that there never was any attempt to apply, or allocate, or appropriate the entire amount to Fort Campbell. Concerning this he said that there was no "bookkeeping decision or an auditing decision or a company decision" to do so. (App. Pg. 26a) Counsel for defendants admit that there was no attempt to allocate the entire payment to Campbell. (App. Pg. 29a)

On the basis of the foregoing evidence, as well as other testimony and evidence of record, the trial Court made the following finding (App. Pg. 18a):

> The Fort Campbell and the Fort Benning projects constituted distinct and separate transactions between the same parties, Southern and Pickard; yet this payment of $35,000 unquestionably pertained to both. Thus it is a claim or payment which grows out of both transactions and is common to both. It therefore "arises out of" the transactions at both Fort Benning and Fort Campbell. It is very appropriately associated with both lawsuits, both causes of action. The payment was unallocated by anyone. It was not applied specifically to either job at the time of

payment. It was simply accepted and received as one indivisible, over all payment, constituting a complete release of any liability of Southern to Atlas growing out of both jobs.

The Circuit Court of Appeals for the Sixth Circuit found to the same effect when it ruled (Page 28 of the Petition) that, "We are of the opinion that this payment arose out of the transaction which was the subject matter of the suit filed in the District Court in Georgia, within the meaning of the rule."

ARGUMENT

The decision of the lower Court, and the briefs in this case, show that the rule involved here (Rule 13(a) Federal Rules of Civil Procedure) has been the subject of interpretation on many occasions by lower Courts, and indeed in an important case by this Court itself.

Rule 13(a) is simply a broadening of former Equity Rule 30, and the latter Equity Rule was carefully considered and construed by this Court in *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610, 46 S. Ct. 367, 371, 70 L. Ed. 750, 45 A. L. R. 1370. For decisions of other courts construing and interpreting Rule 13(a) *see Lesnik v. Public Industrial Corporation*, Cir. 2, 144 F(2) 968, 975; *Switzer Bros. v. Locklin*, Cir. 7, 207 F(2) 483, 488; *Cleveland v. Higgins*, Cir. 2, 148 F(2) 722, 724; *United States to the use of Foster Wheeler Corp. v. American Surety Company of New York*, Cir. 2, 142 F(2) 726; *Hancock Oil Co. v. Universal Oil Products Co.*, 9 Cir., 115 F(2) 45; 120 F(2) 959; *Home Ins. Co. of New York v. Trotter*, 8 Cir., 130 F(2) 800. See also *Moore's Federal Practice*, Vol. 3, Sec. 13.12 and 13.13.

This is simply another case in which the lower courts have applied the terms of the Rule. There is nothing new or different about this case except, possibly, some of the facts. Standing alone a new set of facts does not justify *certiorari*.

None of the usual grounds for granting a writ of certiorari are present here. For example, this is not a case where a State Court has decided a Federal question of substance not heretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court; nor is it a case where a Court of Appeals has rendered a decision in conflict wtih the decision of another Court of Appeals on the same matter. It is not a case where a Court of Appeals has decided an important question of Federal law which has not been previously considered and determined by this Court; nor is it a case where a Court of Appeals has decided a Federal question in a way that conflicts with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted

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